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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961.

No. 608

ELLA SHURE CAHEN TRUST, etc., et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX

	PAGE
The Opinions Below	1
The Grounds On Which The Jurisdiction Of This Court Is Invoked	2
The Date of the Judgment Sought to Be Reviewed and the Time of Its Entry	2
The Statutory Provision Conferring on This Court Jurisdiction to Review the Judgment in Question	2
Time to file this Petition was extended by this Court	2
The Questions Presented For Review	2
The Constitutional Provision Involved	3
The Statute Involved	3
Statement Of The Case	5
The Decision of the Court of Appeals	6
Reasons Relied Upon For The Allowance Of The Writ Of Certiorari	8
I. The decision of the Court of Appeals is in square conflict with decisions of other courts of appeals	8
II. The proper interpretation of the 1942 amendment to the internal revenue code of 1939 is of sufficient national moment to elicit this court's writ of certiorari	12
III. The question of the constitutionality of the statutory provision as applied to the instant case is of sufficient national moment to elicit this court's writ of certiorari	16
Conclusion	17

PAGE

APPENDICES.

Appendix I—The Opinion of the Court of Appeals of July 19, 1961 ..... 1a

Appendix II—The Judgment of the Court of Appeals of July 19, 1961 ..... 13a

Appendix III—The Order of this Court extending the time to file this petition 14a

Appendix IV—Stipulation of Facts in the District Court 15a

CASES CITED.

Aaron's Estate v. Commissioner, 224 F. 2d 314 (C.A. 3d, 1955), reversing Estate of Charles I. Aaron, 21 T.C. 377 (1953) 14

Acker v. Commissioner, 258 F. 2d 568 (C.A. 6th, 1958), affirmed 361 U.S. 87 (1959) 12

Bilder, Commissioner v., 289 F. 2d 291 (C.A. 3d, 1961), certiorari filed September 1, 1961 .....10, 11, 15

Carlton, Estate of Newcomb, 34 T.C. 988 (1960), on appeal to C.A. 2d 7, 9

Manufacturers Nat. Bank of Detroit, United States v., 363 U.S. 194 (1960) 7, 16, 17

Mudge, Estate of Edmund W., 27 T.C. 188 (1956) 7, 9, 14

Reybine, Helvering v., 83 F. 2d 215 (C.A. 2d, 1936) 7, 8, 10, 13

CONSTITUTION OF THE UNITED STATES.

Fifth Amendment 3

STATUTES.

Section 811, Internal Revenue Code of 1939 4

Section 404(a), Revenue Act of 1942 4

PAGE

COMMITTEE REPORTS.

H. Rep. No. 2333, 77th Cong. 1st Sess., 1942-2 Cum. Bull., pp. 372, 491 10

S. Rep. No. 1631, 77th Cong. 1st Sess., 1942-2 Cum. Bull., pp. 504, 676 10

H. Rep. No. 1337, 83d Cong. 2d Sess., p. A60 11

S. Rep. No. 1622, 83d Cong. 2d Sess., p. 218 11

REGULATIONS.

Treasury Decision 4296, IX-2 Cum. Bull. (1930), p. 427 12

Regulations 80, March 18, 1937 edition, Articles 25 and 27 12

Treasury Decision 5032, 1941-1 Cum. Bull., p. 427 13

RULINGS.

I.T. 2553, IX-2 Cum. Bull. (1930), p. 101 12

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SUPREME COURT OF THE UNITED STATES

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit of which review is sought in this case is reported as *Ella Shure Cahen Trust, etc., et al.* v. *United States of America,* 292 F. 2d 33. That opinion is reprinted as Appendix I to this Petition, pages 1a to 12a.

That opinion affirmed a judgment of the District Court for the Northern District of Illinois, Eastern Division, that is reported as *Ella Shure Cahen Trust, etc.* v. *United States of America,* 193 F. Supp. 1. That opinion is reprinted in Appendix I of the certified copy of the record, pages 20 to 32.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The Date of the Judgment Sought to Be Reviewed and The Time of Its Entry.

The date of the judgment sought to be reviewed and the time of its entry is July 19, 1961. Appendix II, p. 13a.

The Statutory Provision Conferring on This Court Jurisdiction to Review the Judgment in Question.

This Court's jurisdiction to review the judgmen' in question is conferred by Section 1254 of the Judicial Code (28 U.S.C. 1254).

TIME TO FILE THIS PETITION WAS EXTENDED BY THIS COURT.

On September 8, 1961, this Court upon application by the petitioners entered an order extending the time to file this petition for writ of certiorari to and including December 16, 1961. That order is reprinted as Appendix III to this petition, page 14a.

THE QUESTIONS PRESENTED FOR REVIEW.

All of the questions presented for review arise from facts stipulated by the parties in the District Court. The Stipulation of Facts is reprinted as Appendix IV to this Petition, pages 15a to 21a.

Those questions are:

1. The decedent, Nathan Shure, during 1935 assigned certain policies of insurance on his life to a funded irrevocable trust created by him in 1934. Thereafter, the trust paid out of trust income all of the premiums on such policies until the decedent's death in 1952. The question is whether the payment

of premiums by the trust was an indirect payment thereof by the decedent, so as to give rise to estate tax on a portion of the insurance proceeds.

2. Some seven years after the assignment of the policies of insurance to the trust, when they, and the payment of the premiums thereon, were beyond the recall or control of the decedent, the federal estate tax law was amended by adopting the premium payment test as a test for the inclusion of insurance proceeds in the taxable estate. The question is whether the retroactive application of that amendment violates the Fifth Amendment to the Constitution of the United States.

THE CONSTITUTIONAL PROVISION INVOLVED.

FIFTH AMENDMENT.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE STATUTE INVOLVED.

The statutory provisions involved are Section 811 of the Internal Revenue Code of 1939 and Section 404 of the Revenue Act of 1942.

The relevant texts are as follows:

Internal Revenue Code of 1939:

Sec. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

• • •

(g) [as amended by Section 404(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Proceeds of Life Insurance*—

(1) *Receivable by the executor.*—To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

(2) *Receivable by other beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person, • • •.

• • •

(26 U.S.C. 1952 ed., Sec. 811.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 404. PROCEEDS OF LIFE INSURANCE.

• • •

(c) *Decedents to which Amendments Applicable.*—The amendments • • • shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid

directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy.

STATEMENT OF THE CASE.

All of the facts in this case were stipulated by the parties in the District Court (Stipulation of Facts, App. IV, pages 15a to 21a. The facts relied on by petitioners for reversal of the judgment below are as follows:

Nathan Shure ("Shure") died July 11, 1952 (App. IV, p. 15a). From 1914 to 1934 six policies of insurance were issued on Shure's life naming N. Shure Co. ("Company") as the beneficiary and Shure relinquished all rights of ownership in the policies (App. I, p. 1a; App. IV, p. 15a). On December 27, 1934, Shure created an irrevocable funded trust, which derived its income from securities transferred to it by Shure and from investments of accumulations of income (App. IV, p. 18a).[1] On August 20, 1935, Shure purchased the policies from the Company for their cash surrender value (App. IV, p. 17a). During 1935 Shure named the trust as beneficiary of all of the policies and assigned all of his interest in them to the trust by way of gift, retaining no incidents of ownership therein (App. I, p. 2a; App. IV, p. 18a). Prior to August 20, 1935, all of the premiums on the policy were paid by the Company (App. IV, p. 19a). Thereafter, and until Shure's death, they were all paid by the trust (App. IV, p. 19a). Shure paid income tax on the portion of the

[1] The trust is reprinted in the Appendix Exhibit Volume of the certified record, pp. 47 to 65.

trust income that was used to pay the premiums (App. IV, p. 19a). The Government has conceded that after the transfer of the policies to the trust in 1935, *Shure had no incidents of ownership therein,* and therefore that no part of the premiums paid on or before January 10, 1941, should be taken into account in determining the taxable portion of the insurance proceeds. The Government included in the taxable estate that portion of the proceeds which bore the same ratio to the total proceeds as the premiums paid after January 10, 1941, bore to the total premiums paid, its theory being that the payment of premiums by the trust was the payment of premiums by Shure (App. I, p. 2a; App. IV, p. 15a).

Petitioners brought this suit for the recovery of federal estate tax in the United States District Court for the Northern District of Illinois, pursuant to 28 U.S.C., Section 1346(a). The District Court dismissed petitioners' complaint, *Ella Shure Cahen Trust, etc.* v. *United States of America*, 193 F. Supp. 1 (certified copy of record, Appendix I, pp. 20 to 32).

The Court of Appeals affirmed, *Ella Shure Cahen Trust, etc., et al.* v. *United States of America*, 292 F. 2d 33 (App. I, pp. 1a to 12a), but remanded the case to the District Court to fix reasonable attorneys' fees as a deduction from the gross estate, and to allow a refund accordingly (App. II, p. 13a).

The Decision Of The Court Of Appeals.

The Court of Appeals concluded, primarily on the basis of certain Congressional committee reports that accompanied the Revenue Bill of 1942, that the payment of premiums by the trust was the indirect payment of the premiums by Shure. The Court of Appeals disre-

garded the fact that the only authority on the question prior to the Revenue Act of 1942 was the decision of the Second Circuit in *Helvering* v. *Reybine*, 83 F. 2d 215 (1936), which interpreted language identical to that of the Revenue Act of 1942 and reached the opposite conclusion.

The Court of Appeals also refused to follow *Estate of Edmund W. Mudge*, 27 T.C. 188 (1956), which was acquiesced in by the Commissioner of Internal Revenue, and *Estate of Newcomb Carlton*, 34 T.C. 988 (1960) presently pending on appeal in the Second Circuit,[2] in both of which cases the Tax Court held adversely to the Commissioner on this issue. Those cases and *Reybine* are the only square holdings on the present question, and all were decided for the taxpayer.

The Court of Appeals further held that the decision of this Court in *United States* v. *Manufacturers Nat. Bank of Detroit*, 363 U.S. 194 (1960), refuted the contention of petitioners that Section 811(g)(2) of the Internal Revenue Code of 1939, as amended in 1942, was unconstitutional when applied to the facts here, as in violation of the Fifth Amendment.

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[2] PETITIONERS HAVE BEEN ADVISED THAT THE CARLTON CASE WAS ARGUED IN THE SECOND CIRCUIT ON DECEMBER 6, 1961. IT WILL BE NOTED THAT THE SECOND CIRCUIT ALSO DECIDED THE REYBINE CASE, WHICH IS IN CONFLICT WITH THE PRESENT CASE. THEREFORE, PETITIONERS RESPECTFULLY SUGGEST THAT ACTION ON THIS PETITION BE DEFERRED UNTIL THE SECOND CIRCUIT DECIDES THE CARLTON CASE.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

I.

THE DECISION OF THE COURT OF APPEALS IS IN SQUARE CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The test for the application of the federal estate tax to life insurance proceeds was the subject of great confusion and vacillation until the enactment of the Revenue Act of 1942. Prior to that time, taxability was at one time determined by whether the insured-decedent had paid the premiums; at another time by whether he had retained incidents of ownership in the policy, regardless of who paid the premiums; and still at another time by a dual test which comprehended either or both of the foregoing.

Finally, the Revenue Act of 1942 amended the Internal Revenue Code of 1939 by imposing the tax if the decedent either had paid the premiums or retained incidents of ownership. In the former case, that portion of the proceeds was taxable which bore the same ratio to the total proceeds as the premiums paid by the decedent bore to the total premiums paid. In determining the amount of premiums paid by the decedent, all premiums paid by him prior to January 10, 1941, were excluded if he retained no incidents of ownership after that date.

Helvering v. *Reybine*, 83 F. 2d 215 (C.A. 2d, 1936), which is submitted to be in square conflict with the decision below, involved a decedent who died in 1929, when the Treasury Regulations had the same dual "premium payment and incidents of ownership" test as that finally

adopted in the Revenue Act of 1942 and applicable here. The policies in that case had been assigned in 1925 to irrevocable trusts created by the decedent for his children. The Court of Appeals held that the decedent had retained incidents of ownership, but further held that the resulting tax was limited to that portion of the insurance proceeds which bore the same ratio to the total proceeds as the premiums paid by the decedent bore to the total premiums paid by him and the trust. In short, the Court of Appeals in *Reybine* held that premium payments by the trust were not direct or indirect premium payments by the decedent.

Although the Court of Appeals below attempted to distinguish *Reybine*, it did not meet the rationale thus expressed by the Court in that case (p. 217):

> The trustees paid these premiums and kept the policies alive. The insured's estate should not now be called upon to pay the tax on all. It would be unjust to tax as part of the decedent's estate that which had been bought and paid for by another.

Reybine was followed by the Tax Court in its decisions in *Estate of Edmund W. Mudge*, 27 T.C. 188 (1956), and *Estate of Newcomb Carlton*, 34 T.C. 988 (1960). The Court of Appeals below does not even attempt, as it did with *Reybine*, to distinguish the Tax Court decisions. It contented itself with saying that neither decision gave attention to the 1942 amendment and the committee reports. On the contrary, however, both opinions not only cite, but quote the relevant portion of, the 1942 amendment.

The foregoing three cases are the only square holdings on the present question, apart from the instant case, and all three are in square conflict with the instant case.

A second conflict arises out of the principal reliance of the Court of Appeals below, namely, the committee reports accompanying the Revenue Bill of 1942. Those reports stated that it was the intention of Section 404 of the Revenue Act of 1942 to prevent avoidance of estate tax, and that the Section should be construed in that context. An illustration given of the payment of premiums by the insured was the payment of premiums by a trust whose income was taxable to the insured, *e.g.*, a funded insurance trust (H. Rep. No. 2333, 77th Cong. 1st Sess., 1942-2 Cum. Bull., pp. 372, 491; S. Rep. No. 1631, 77th Cong. 1st Sess., *ibid.* pp. 504, 676).

Reybine was a clear holding that the payment of premiums by an irrevocable trust was not a direct or indirect payment of premiums by the settlor. Its holding was a judicial construction of the language of the Treasury Regulations, which Congress adopted verbatim in the 1942 amendment. If Congress had intended to reject the *Reybine* construction of that language, it could easily have done so. Instead, it adopted the very language of the Regulations that had been construed by the Court of Appeals in *Reybine*, carrying with it the gloss that had been placed thereon by the *Reybine* decision.

In holding that despite the foregoing, the committee reports must nevertheless be taken as conclusive of the construction of the language, "paid directly or indirectly," the decision of the Court below is squarely in conflict with *Commissioner* v. *Bilder*, 289 F. 2d 291 (C.A. 3d, 1961) certiorari filed September 1, 1961, insofar as the principle of statutory construction is concerned. The issue there was the deductibility of lodging costs as medical expenses. The Internal Revenue Code of 1939 was silent as to the deductibility of either transportation

or lodging costs as medical expenses, but the courts had allowed such deductions in proper cases and the Government had acquiesced in those allowances. The Internal Revenue Code of 1954 expressly allowed the cost of transportation as a medical expense but was silent as to lodging expenses. Nevertheless, the committee reports stated that the provisions allowing transportation expense "clarified" existing law by specifically excluding the deduction for lodgings, and a very clear illustration to that effect was presented. S. Rep. No. 1622, 83d Cong. 2d Sess., p. 218; H. Rep. No. 1337, 83d Cong. 2d Sess., p. A60.

The Commissioner argued that the reports clearly established that Congress intended to change the rule that had been developed by the courts under the 1939 Code. The taxpayer urged that both Codes defined "medical care" in the same terms, and that since the 1939 Code, as construed by the courts, permitted lodging expenses to be deducted, Congress by reenacting the 1939 Code language provided for the continuance of such deductions. The Court of Appeals held for the taxpayer.

The basic issue in the *Bilder* case is virtually on all fours with the instant case insofar as the principle of statutory construction is concerned. Here, as in *Bilder*, there had been a reenactment of language which had acquired a gloss of judicial construction. The committee reports that accompanied the reenactment expressly negated the previous judicial construction. In the instant case, the Court of Appeals followed the committee reports rather than the reenacted language; in *Bilder*, the Court followed the reenacted language, refusing to exalt the committee reports to the status of legislation.

II.

THE PROPER INTERPRETATION OF THE 1942 AMENDMENT TO THE INTERNAL REVENUE CODE OF 1939 IS OF SUFFICIENT NATIONAL MOMENT TO ELICIT THIS COURT'S WRIT OF CERTIORARI.

Since the enactment of the Internal Revenue Code of 1954, the sole test for the application of the estate tax to insurance proceeds is the incidents of ownership test. If Shure had lived another two years there would have been no case here. However, the issue here transcends the niceties of the tests for the application of the estate tax to insurance proceeds, and poses the fundamental question whether legislation is accomplished "by unequivocal language embodied in a statute regularly enacted conformably to the Constitution, *and not by a committee report that is neither voted on by the members of both Houses nor submitted to the President for his approval*" (italics supplied), *Acker* v. *Commissioner*, 258 F. 2d 568, 576 (C.A. 6th, 1958), affirmed 361 U.S. 87 (1959).

Prior to the Revenue Act of 1942, the history of the application of the federal estate tax to the proceeds of life insurance was one of uncertainty and vacillation between the so-called "premium payment" test, the "incidents of ownership" test, and the dual "premium payment and incidents of ownership" test. During 1934 and 1935, when the events transpired which gave rise to the present case, the Treasury Department's position was that taxability turned on whether the insured-decedent had incidents of ownership in the policy at the time of his death. This position had already been taken as far back as 1930, Treasury Decision 4296, IX-2 Cum. Bull. (1930), p. 427; I.T. 2553, IX-2 Cum. Bull. (1930), p. 101, and remained the official position until 1941, Regulations 80, March 18, 1937 edition, Articles 25 and 27. Thus,

when Shure transferred all of his ownership rights in the policies to the trust in 1935, the estate tax was based on the retention by the decedent of incidents of ownership in the policies on his life; if the decedent retained no such rights, and Shure did not, tax was not created regardless of his continued payment of the premiums. In 1941 the Treasury Department, by Regulations, swung to the double-barreled "premium payment and incidents of ownership" test, Treasury Decision 5032, 1941-1 Cum. Bull., p. 427. In order to obviate the injustice of a retroactive application, the Treasury Decision limited the premium payment test to premiums paid after January 10, 1941, its effective date, and did not apply it (a) to premiums paid before that date if the insured had died before then and at the time of his death had no incidents of ownership in the policy, or (b) to premiums paid before that date if the decedent had no incidents of ownership after that date. Perhaps because of doubt as to the validity of the Treasury Decision, it was superseded by Section 404(a) of the Revenue Act of 1942, effective October 21, 1942, which also adopted the dual test. However, by the time of the adoption of the Revenue Act of 1942, *Reybine* had already placed a gloss of judicial construction on the identical language adopted by that Act. If Congress had intended to reject the *Reybine* construction of that language, it could easily have done so. Instead, it adopted the very language that had been construed by the Court, carrying with it the gloss placed on it by the Court. One can hardly impute to Congress the intent to override judicial construction of language merely by a comment in a committee report. One would suppose that Congressional overriding of a rule of law that had been enunciated by an upper court of the federal judiciary would assume a form more consonant with the equal stature of that branch of Government.

Particularly is this true, first, in light of the previous and subsequent[3] vacillation and confusion on the part of the administrative branch, and secondly, in light of the manifest injustice of applying a rule of doubtful validity to a situation which the taxpayer couched in a form that was permissible at the time he created the trust and which he had no way of undoing after the rule was retroactively altered to his detriment.

If resort to legislative history is appropriate here, there is little justification for singling out the committee reports, which are but one aspect of the totality of the legislative history of a statute. Framed against that broader background, the failure of Congress to negate the earlier construction of identical language is highly significant.

Furthermore, there is no known rule of statutory construction which requires that committee reports be given controlling effect, regardless of how faulty and illogical they may be. The committee reports here manifest a basic failure of logic. They say that "A decedent • • • pays the premium • • • if payment is made • • • by a trust whose income is taxable to him, as, for example, a funded insurance trust." Here is illogic with a vengeance. It is quite possible to set up a funded insurance trust in such a way that the income will not be taxable to the settlor. Do the committee reports seriously mean to say

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[3] Note in this connection the Commissioner's acquiescence in **Estate of Edmund W. Mudge, supra.** Note further his failure even to raise the present issue in **Aaron's Estate v. Commissioner,** 224 F. 2d 314 (C.A. 3d, 1955), reversing **Estate of Charles I. Aaron,** 21 T.C. 377 (1953), even though the facts of that case squarely involved the issue. Instead, the Commissioner relied on other grounds and lost the case.

that the settlor's estate would in such a case escape estate tax on the insurance proceeds, while in the case of a settlor who unfortunately sets up his trust so that its income is taxable to him, his estate would be subject to tax on the insurance proceeds that were paid to the trust!

It is straining credulity to be asked to construe a statute on the basis of an illogical and apparently ill-conceived statement in a committee report.

As the Court said in *Bilder, supra*, p. 304:

> If Congress had wanted to effect the limitation urged by the Commissioner, "it would have been easy to have said so in express terms; and because it did not do so, we are led irresistibly to the conclusion that it did not intend * * *" to do so. *Tillson v. United States*, 1879, 100 U.S. 43, 46 * * *.

It is submitted that committee reports are not a substitute for legislation. The pattern of the federal tax laws historically and ever-increasingly has been to penetrate into minutia rather than to lay down a code of principles for the administrative and judicial branches. If Congress must continue to assert its legislative prerogative of pinpointing the application of the tax laws rather than to rely on administration and construction by the other branches of Government, it would seem that it should be required to legislate according to constitutional process and not by way of inexact, informal and nonlegislative narrative and illustration.

III.

THE QUESTION OF THE CONSTITUTIONALITY OF THE STATUTORY PROVISION IF APPLIED TO THE INSTANT CASE IS OF SUFFICIENT NATIONAL MOMENT TO ELICIT THIS COURT'S WRIT OF CERTIORARI.

The Court of Appeals relied on the decision of this Court in *United States* v. *Manufacturers Nat. Bank of Detroit,* 363 U.S. 194 (1960), as complete refutation of the petitioners' contention that the statutory provision involved here is unconstitutional when applied to the instant case, as being in violation of the Fifth Amendment.

It is maintained, however, that the facts of the two cases are distinguishable. In the *Manufacturers Nat. Bank* case, the insured died July 15, 1954. On December 18, 1936, he had divested himself of his rights in certain policies of insurance on his life by assigning them to his wife. However, he continued to pay the premiums on the policies until he died. The Government determined that the portion of the proceeds attributable to premiums paid by the insured after January 10, 1941, should be included in his estate.

In denying the executor's contention that the Revenue Act of 1942 operated retroactively in violation of the due process clause, this Court pointed out (1) that all of the premiums were paid after the insured was put on notice of the premium payment test, and that all but a few of the premiums were paid after the effective date of the Revenue Act of 1942, and (2) that although the choice was between "unpleasant alternatives," *viz.*, (a) stoppage of premium payments and consequent loss of the policy, or (b) estate taxation, that choice alone did not create unconstitutional retroactivity.

That case is clearly distinguishable from the present. The insured there had a choice, albeit harsh. Here, Shure had no choice at all. Not only were the policies completely beyond his control, but so was the matter of payment of premiums. In the *Manufacturers Nat. Bank* case, the insured could have stopped paying the premiums and so ended the problem. Shure could not. He had no choice between loss of the policies for nonpayment of premiums, or continuing the payments and thus incurring estate tax. In fact, he had no choice of any kind. There would seem to be little difference between the imposition of an estate tax under such circumstances and the imposition of a manufacturers excise tax in 1961 on a product that had been sold by the manufacturer some years before, at a time when there was no such tax.

It is submitted that the Government should be held to a higher standard of dealing.

CONCLUSION.

For the reasons developed above, petitioners respectfully submit that this Court should grant certiorari in this case and reverse the judgments below.

Respectfully submitted,

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APPENDIX I.

THE OPINION OF THE COURT OF APPEALS OF JULY 19, 1961, 292 F. 2d 33.

No. 13272 SEPTEMBER TERM 1960—APRIL SESSION 1961.

ELLA SHURE CAHEN TRUST, etc., et al.,
Plaintiffs-Appellants,
v.—
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 19, 1961

Before DUFFY and KNOCH, *Circuit Judges*, and PLATT, *District Judge*.

PLATT, *District Judge*. Plaintiffs-appellants being the surviving residuary legatees under the Last Will of Nathan Shure, deceased, have appealed from a decision of the District Court denying a refund of a part of the Federal estate tax paid in the estate of Nathan Shure, deceased.

All of the facts were stipulated. From 1914 to 1934 six policies of life insurance were issued on the life of Nathan Shure naming the N. Shure Co. as the beneficiary and Shure relinquished all rights of ownership in the policies. Shure, on December 27, 1934, created an irrevocable trust, and transferred to the trust, without consideration, 100 shares of Nathan Shure Realty Corporation. The trust derived its income from these securities and from investments of accumulations from income. August 20, 1935, Shure purchased the life insurance policies from the N. Shure Co. for their cash surrender value of $32,548.07.

The beneficiary under each policy was then changed to the Nathan Shure Trust and Shure retained no incidents of ownership in the policies. Shure paid the Federal gift tax on this transfer and his estate was given credit on the Federal estate tax for the amount so paid. From August 20, 1935, to Shure's death on July 11, 1952, the premiums on the life insurance policies were paid by the Nathan Shure Trust. Nathan Shure paid the income tax on the portion of income which the Trustees used to pay premiums on these life insurance policies. The proceeds from the life insurance policies in the amount of $276,936.38 were paid to the Trustees of the Nathan Shure Trust. The District Court held that "[t]he premium payments made on all the policies . . after January 10, 1941 by the trustees of the Nathan Shure Trust were 'paid . . . indirectly by the decedent' within the meaning of the provisions, as well as the legislative purpose of Section 811(g)(2)(A) of the Internal Revenue Code of 1939, as amended." As a result of this holding, that portion of the amount received by the trust from the life insurance policies which bore the same ratio to the total proceeds as the premiums paid after January 10, 1941, bore to the total premiums paid, was included in the gross estate of Nathan Shure, deceased, and was subjected to Federal estate tax. This increased the Federal estate tax $76,517.88 which appellants attempted to recover by this suit in the District Court. (This premium payment test was repealed by the Revenue Act of 1954, 26 U.S.C.A. §2042.)

The appellants claim this decision of the District Court should be reversed for two reasons:

(1) That since decedent had no incidents of ownership in the policies, the payment of premiums by the trust out of the income from the trust funds was not an indirect payment of the premiums by the Insured after January 10, 1941, under Section 811(g)(2)(A) of the Internal Revenue Code of 1939, as amended.

(2) That if this Section is applicable and so construed in the instant case, it is retroactive in its application and violates the Fifth Amendment to the Constitution.

In determining the issues, this Court must first look to the statutes and regulations involved.

Internal Revenue Code of 1939.

"§811. Gross estate

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

• • •

(g) [as amended by Sec. 404(a) of the Revenue Act of 1942. 26 U.S.C.A. 1948 ed. §811(g).] Proceeds of life insurance

(1) Receivable by the executor. To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

(2) Receivable by other beneficiaries. To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. . . . For the purposes of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest.

• • •"

§404(c), Revenue Act of 1942, 26 U.S.C.A. provides that:

"(c) Decedents to which amendments applicable. The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; [October 21, 1942] but in determining the proportion of the premiums or other consideration paid directly or indirectly by the

decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy."

Under Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939, as amended in 1942:

"§81.27 [As amended by T.D. 5239, 1943 Cum. Bull. 1081, and T.D. 5699, 1949-1 Cum. Bull. 181. Federal Tax Regulations, 1954, U.S. Code Congressional & Administrative News, p. 818] Insurance receivable by other beneficiaries.

(a) In case of decedent dying after December 31, 1947. (1) The regulations prescribed under this paragraph (except as otherwise indicated in this section) are applicable only in the case of decedents who died after December 31, 1947. In such cases, the amount of the aggregate proceeds of all insurance on the life of the decedent not receivable by or for the benefit of his estate must also be included in his gross estate, as follows:

(i) Such insurance (not includible under subdivision (ii) of this subparagraph) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, and

(ii) Such insurance with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any person.

(2) The purchaser of insurance upon the life of the decedent is attributed to the decedent even though the premiums, or other consideration, are paid only indirectly by the decedent. As thus used, the phrase 'paid indirectly by the decedent' is intended to be broad in scope. For example, if the decedent transfers funds to his wife so that she may purchase insurance on his life, and she purchases such insurance, the pay-

ments are considered to have been made by the decedent even though they are not directly traceable to the precise funds transferred by the decedent. A decedent similarly pays the premiums or other consideration if payment is made by the corporation which is his alter ego or by a trust whose income is taxable to him, as, for example, a funded insurance trust. A payment is also made by the decedent if the decedent's employer makes the payment as compensation for services.

• • •"

Appellants first contend that since all the premiums on the life policies were paid by the Trustees of the Nathan Shure Trust after 1935, when the policies were transferred to the trust, Section 811(g) of the Internal Revenue Act of 1939, as amended by the Act of 1942, should not apply.

The effect of the amendment of the Revenue Act in 1942 to include proceeds of life insurance in the gross estate of a decedent will be in better perspective after a brief review of the prior Acts and regulations. (For changes in Acts and regulations see *Estate of Ellis Baker*, 1958, 30 T.C. 776, 781-782.)

The Revenue Act of 1939 read in part:

"§811. Gross estate

• • •

"(g) Proceeds of life insurance.

To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." U.S. Code, 1940 ed., Title 26, §811(g), p. 2164.

This statute in substance remained the same until it was materially changed by the 1942 amendment of the Revenue Act. The regulations changed from 1918 at various times down to the Treasury Regulations 105, §81.27 adopted

after the 1942 amendment. The prior regulations provided for either the premium payment test, or the incidents of ownership test, or both. *Estate of Ellis Baker, supra.* The Treasury Regulations, T.D. 5032, 1941-1 Cum. Bull. 427, approved January 10, 1941 provided as follows:

"Article 25 . . . of Regulations 80, 1937 edition . . . amended as herein indicated.

"In lieu of the second paragraph of article 25, . . . the following is substituted:

The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system. Insurance receivable by beneficiaries other than the estate is considered to have been taken out by the decedent where he paid, either directly or indirectly, all the premiums or other consideration wherewith the insurance was acquired, whether or not he made the application. Such insurance is not considered to have been so taken out, even though the application was made by the decedent, if no part of the premiums or other consideration was paid either directly or indirectly by him. Where a portion of the premiums or other consideration was actually paid by another and the remaining portion by the decedent, either directly or indirectly, such insurance is considered to have been taken out by the latter in the proportion that the payments therefor made by him bear to the total amount paid for the insurance.

• • •"

"Article 27 . . . is amended to read as follows:

Art. 27 Insurance receivable by other beneficiaries. —The amount in excess of $40,000 of the aggregate proceeds of all insurance on the decedent's life not receivable by or for the benefit of his estate must be included in his gross estate as follows:

"(1) To the extent to which such insurance was taken out by the decedent upon his own life (see article 25) after January 10, 1941, the date of Treasury Decision 5032, and

> "(2) To the extent to which such insurance was taken out by the decedent upon his own life (see article 25) on or before January 10, 1941, and with respect to which the decedent possessed any of the legal incidents of ownership at any time after such date or, in the case of a decedent dying on or before such date, at the time of his death.
>
> • • •"

Congress by the 1942 amendment of the Revenue Act in Section 811(g) and Section 404(c) adopted the substance of the Treasury Regulations of January 10, 1941, and established in the statute both the premium payment test and the incidents of ownership test. It eliminated the $40,000 exemption and omitted "policies taken out by the decedent upon his own life." By such action, Congress definitely intended the premium payment test to be used. The amendment used the words "paid . . . indirectly by the decedent." The word "indirectly" means: ". . . circuitous . . .; not leading to aim or result by the plainest course or method or obvious means; . . . roundabout: . . . not resulting directly from an act or cause but more or less remotely connected with or growing out of it." Webster's New International Dictionary. The amendment described no method of indirect payment. In *United States v. Public Utility Comm'n.*, 1953, 345 U.S. 295, p. 315, the Supreme Court set forth the rule on construction of a statute:

> "Where the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation. Where the words are ambiguous, the judiciary may properly use the legislative history to reach a conclusion."

This Court is therefore justified in resorting to and should use the legislative history in the construction of the amendment of 1942.

This Court now turns to the "Committee Reports — Revenue Act of 1942" (IRB, Cum. Bull., 1942-2, July-December, 1942.) which set forth on pages 417-418:

"Section 404 of the bill amends the existing law governing the inclusion of the proceeds of life insurance in the gross estate of a decedent. The amend ment not only eliminates the existing exclusion of $40,000 for certain proceeds other than those receivable by the executor but also sets forth explicitly the criteria of their includibility in the gross estate. Recognizing the testamentary nature of insurance on the life of the decedent, both where premiums are paid, directly or indirectly, by him and where he possessed at the time of his death some incident of ownership, your committee proposes to include all proceeds of such insurance in the gross estate.

"The increase in the specific exemption from $40,000 to $60,000 compensates in some measure for the discontinuance of the $40,000 exclusion."

At page 490 of the same Cum. Bull.:

"Section 404. Proceeds of Life Insurance.

"This section is designed to clarify the status of proceeds of life insurance under the estate tax.

• • •

"The inclusion in the gross estate of proceeds which are payable to beneficiaries other than the executor is to be determined for the purposes of this section by criteria set forth therein. These criteria are (1) the payment of premiums or other consideration by the decedent for the insurance, and (2) incidents of ownership possessed by the decedent at death. If either of these criteria is satisfied the proceeds are includible in the gross estate. The section provides with respect to the premium payments test that insurance purchased with premiums, or other consideration, paid directly or indirectly by the decedent, shall be included in the gross estate in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance.

• • •

"Payments of premiums or other consideration by the decedent include payments made by him directly

> or indirectly. This provision is intended to prevent avoidance of the estate tax and should be construed in accordance with this objective. For example, if the decedent transfers funds to his wife so that she may purchase insurance on his life, and she purchases such insurance, the payments are considered to have been made by the decedent even though they are not directly traceable to the precise funds transferred by the decedent. A decedent similarly pays the premium or other consideration if payment is made by a corporation which is his alter ego or by a trust whose income is taxable to him, as, for example, a funded insurance trust. Payment is also made by the decedent if the decedent's employer makes payment as compensation for services. These examples merely illustrate the concrete application of the provision."

(The Senate Committee Report, No. 1631, 77th Congress, Second Session, contained the foregoing language. 1942-2 Cum. Bull. pages 504, 676.)

In the light of the foregoing history, Congress must have intended by the amendment of 1942 to maintain a stable application of Section 811(g), and also intended that the amendment be construed broadly "to prevent avoidance of the estate tax." The Committee Report even went further and set forth various examples of situations to which the amendment should be applied. The Nathan Shure Trust must be examined in view of the broad application of Section 811(g)(2)(A) of the Internal Revenue Code of 1939, as amended.

Nathan Shure created a trust in December, 1934, and transferred the life policies to the trust in 1935. The trust read:

> "The Trustees agree that they will receive said securities . . . and such additional securities, property . . . as may be transferred, . . . and delivered to the Trustees to become a part of the principal of the Trust Fund; also the *proceeds* of such policies of insurance issued upon the life of the Settlor, wherein

the Trustees are made the beneficiaries thereunder; . . ." (Emphasis supplied.)

The Trustees were directed to pay $3,000.00 to each of four beneficiaries, and empowered to sell or exchange the trust property, or any part thereof, the same as if they were the owners. The Article in the trust on insurance stated:

> "The Trustees shall pay the premium . . . on any policy or policies of life insurance upon the life of the Settlor wherein the Trustees shall be named as beneficiaries or on any policies of insurance contracted for the protection and security of the Trust."

The beneficiaries under the trust were the Settlor's wife and children, and their issue. There was a possibility of failure of issue and a reversionary interest existed in the Settlor, which was not an incident of ownership under Section 811(g)(2). The life insurance policies were transferred to the trust in 1935 when Shure was 67 years of age as evidenced by the face of the policies.

A reasonable construction of the trust would indicate that Shure intended the Trustees to pay the premiums on the life insurance policies since they agreed to receive the "proceeds" of the life policies. The proceeds of the policy means the fulfillment of the promise by the insurer to pay the face of the policy on the death of the insured. When the policies were transferred to the trust, three of the policies had no cash value. If there came a time when the premiums could not be paid, plus the $3,000.00 to each of the beneficiaries, this Court feels sure the Trustees under the terms of the trust would have refused without an order of a court of equity to have cashed the policies for their surrender value in order to pay the beneficiaries. Shure not only financed the trust, but paid the income tax on the portion of the trust income used to pay the premiums. Evidently, he was required to pay this income tax. *Burnet* v. *Wells*, 1933, 289 U.S. 670; Title 26 U.S.C.A. §677. (Historical Notes thereunder show similar provisions in prior Acts.) One of the examples in the Com-

mittee's Report portrays a situation similar to the payment of premiums by the instant trust, *viz:* "A decedent similarly pays the premium . . . if payment is made . . . by a trust whose income is taxable to him, as, for example, a funded insurance trust." The Nathan Shure Trust presents a "circuitous" or "roundabout" method of paying the premiums on life policies, more or less remotely connected with or growing out of the trust which Nathan Shure created.

This Court, therefore, holds that the premiums which purchased the life insurance policies here involved after January 10, 1941, were paid indirectly by the decedent and that the proportionate share of the proceeds of these life insurance policies must be included in the gross estate of Nathan Shure deceased, as held by the District Court.

The appellants insist that this Court should follow *Helvering* v. *Reybine*, 2 Cir., 1936, 83 F. 2d 216, reversing 31 B.T.A. 314, 1934; *Estate of Edmund W. Mudge*, 1956, 27 T.C. 188, and *Estate of Newcomb Carlton*, 1960, 34 T.C. 988. Reybine was decided prior to the 1942 amendment of the Revenue Act, and under the statute and regulations then in force. The impact of the 1942 amendment, coupled with the legislative history of the Act, destroyed the effect of this decision. It must be noted that there is a difference in the language of the trust of the instant case wherein it expressly provided not only for the payment of the premiums, but also that the Trustees agreed to receive the "proceeds" of the policies.

The Tax Court in *Mudge* followed *Reybine* and failed to give any attention to the 1942 amendment of the Revenue Act or to the Committee Report. In the *Carlton* case, the Tax Court relied upon *Mudge* and it is now on appeal to the United States Court of Appeals for the Second Circuit.

The appellants place weight upon the acquiescence of the Commissioner of Internal Revenue in *Mudge*. IRB, Cum. Bull., 1957-1, p. 4. In effect, appellants attempt to invoke the doctrine of estoppel against the Commissioner

because he has taken a different position here than he did in *Mudge*. Estoppel as a general rule is not applicable to federal officers. There was no reliance on the acquiescence since the trust was created in 1934. The acquiescence in *Mudge* does not estop the Commissioner from insisting upon the imposition of the tax here. See, *Securities and Exchange Commission* v. *Culpepper*, 1959, 2 Cir., 270 F. 2d 241; *Yates* v. *United States*, 9 Cir., 1955, 225 F. 2d 146, reversed on other grounds 354 U.S. 298.

Appellants next contends that Section 811(g)(2)(A) of the Internal Revenue Code of 1939, amended in 1942, is unconstitutional when applied to the facts in this case, as being in violation of the Fifth Amendment to the Constitution of the United States. This Court believes that the Supreme Court in *United States* v. *Manufacturers Nat. Bank*, 1960, 363 U.S. 194, completely refutes the appellants' contention. The facts in the instant case cannot be sufficiently distinguished from the facts in *Manufacturers National Bank*, so as to avoid the effect of this precedent.

Appellants and appellees agree that a refund should be allowed because of a deduction from the gross estate of reasonable attorneys' fees incurred in this proceeding. Section 81.34 as amended by T.D. 5596, 1948-1 Cum. Bull. 127; Federal Tax Regulations, 1954, U.S. Code Congressional & Administrative News, §81.34, p. 825. In order to provide for this refund, the cause is remanded to the District Court to fix reasonable attorneys' fees as a deduction from the gross estate, and allow a refund accordingly. In all other respects the decision of the District Court is hereby AFFIRMED.

APPENDIX II.

THE JUDGMENT OF THE COURT OF APPEALS OF JULY 19, 1961.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Wednesday, July 19, 1961

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Casper Platt, District Judge

ELLA SHURE CAHEN TRUST, etc., et al.,
Plaintiffs-Appellants.
No. 13272 vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that this cause be, and it is hereby, REMANDED to the said District Court to fix reasonable attorneys' fees as a deduction from the gross estate, and allow a refund accordingly. In all other respects the decision of the said District Court is hereby AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX III.

THE ORDER OF THIS COURT EXTENDING THE TIME TO FILE THIS PETITION.

SUPREME COURT OF THE UNITED STATES

October Term, 1961.

Ella Shure Cahen Trust, Etc., Et Al.,

Petitioners,

vs.

United States.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 16th, 1961.

/s/ Tom C. Clark
Associate Justice of the Supreme Court of the United States.

Dated this 8th
day of September, 1961.

APPENDIX IV.

12 IN THE UNITED STATES DISTRICT COURT

• • (Caption—Civil Action No. 58 C 1390) • •

STIPULATION OF FACTS.

It is hereby stipulated and agreed by and between the parties to the above-captioned case that for the purposes of this action the following statements may be taken as true, subject to the right of either party to object to the relevancy of any fact so stipulated and subject to the right of either party to submit further evidence not inconsistent herewith.

1. This action arises under the Internal Revenue laws of the United States for the recovery of Federal Estate Taxes and interest which the plaintiffs claim and which the defendant denies were illegally collected by the
13 defendant. Said action is one of which this Court has original jurisdiction.

2. Nathan Shure died on July 11, 1952. An estate tax return was timely filed by the executors of his estate. Thereafter a deficiency in estate tax was proposed, based in part upon the inclusion in the gross estate of said Nathan Shure of a portion of the proceeds of certain policies of insurance of his life which are described below. This portion bore the same ratio to the total proceeds of the policies as the premiums paid after January 10, 1941 bore to the total premiums paid on the following life insurance policies:

Insurer	Policy No.	Date Issued	Face Amount
Mutual Life Insurance Company of New York	2132343	Feb. 14, 1914	$25,000
Travelers Insurance Co.	1314909	Mar. 29, 1927	100,000
Mutual Benefit Life Insurance Company	1629153 (Reissued)	Feb. 15, 1934 Nov. 25, 1935	25,000

Mutual Life Insurance Company of New York	4,827,416	Feb. 14, 1934	25,000
Mutual Life Insurance Company of New York	4,827,417	Feb. 14, 1934	25,000
Prudential Insurance Company of America	8358962	Feb. 14, 1934	75,000

Copies of the aforesaid policies of insurance are attached hereto as Exhibits A to F, inclusive, and are by this reference expressly made a part hereof. The aforesaid insurance policies attached as Exhibits A to F, 14 inclusive, to this stipulation, together with the application forms and all riders, endorsements and other documents attached thereto, were executed on the dates indicated, by the parties whose signatures appear thereon, were duly delivered, and are in all respects true and correct copies. A true and correct copy of the Revenue Agent's Report dated October 14, 1954, describing the above deficiency in estate tax is attached hereto as Exhibit G, and is by this reference expressly made a part hereof.

3. The total asserted deficiency referred to in paragraph 2 of this stipulation, was in the amount of $212,431.44, plus interest thereon of $12,174.67, all of which was paid on behalf of the decedent's estate as follows:

Date	Amount
October 26, 1954	$ 24,569.62
December 15, 1954	200,000.00
November 6, 1956	36.49
Total	$224,606.11

These payments were made to the Director of Internal Revenue for the District of Chicago, Chicago, Illinois. The person who was at that time Director of Internal Revenue at Chicago, Illinois, no longer held that office when this action was commenced.

4. In December, 1954, final distribution of the estate of Nathan Shure was made to the legatees under his will. On June 10, 1955, Samuel Shure and Joseph N. Shure, the executors of the aforesaid will, were discharged as such executors by order of the Probate Court of Cook County. The three plaintiffs herein are the surviving residuary legatees under the will of Nathan Shure and are entitled in equal shares to any refund determined to be owing by the defendant in this action.

5. On September 20, 1957, each of the plaintiffs herein filed a claim for refund with the Director of Internal Revenue for the District of Chicago, Chicago, Illinois, true and correct copies of which are attached as Exhibits A, B and C to the complaint herein. Each of said claims sought the refund of one-third (⅓) of $76,517.88 with interest. More than six months elapsed after the filing of the aforementioned claims for refund and prior to the commencement of this action and said claims have never been allowed or formally disallowed, in whole or in part, by the Secretary of the Treasury or his delegates down to the present time.

6. On August 20, 1935, Nathan Shure purchased the insurance policies described in paragraph 2 above from N. Shure Co., paying therefor $32,548.07, the then cash surrender value of said insurance policies. A true and correct copy of the minutes of the meeting of the Board of Directors of N. Shure Co. held on August 20, 1935, relating to the above transaction, is attached hereto as Exhibit H and by this reference expressly made a part hereof. At the request and direction of Nathan Shure, the following endorsements in favor of the Nathan Shure Trust were executed and delivered with respect to the following policies:

Insurer	Policy Number	Date of Endorsement
Mutual Life Insurance Company of New York	2132343	November 21, 1935 (2 endorsements)
Travelers Insurance Co.	1314909	August 20, 1935
Mutual Benefit Life Insurance Company	1629153	November 25, 1935 (with undated release of beneficiary)
Mutual Life Insurance Company of New York	4,827,416	September 24, 1935 (2 endorsements)
Mutual Life Insurance Company of New York	4,827,417	September 24, 1935 (2 endorsements)
Prudential Insurance Company of America	8358962	October 8, 1935 (2 endorsements)

Nathan Shure filed a Federal gift tax return for the year 1935 in which he reported the gift of the aforesaid policies valued at the aforementioned purchase price to the Nathan Shure Trust and paid gift tax thereon. Under the United States Internal Revenue Code, a credit is allowed against the Federal estate tax, for gift taxes paid on gifts of property the value of which property is required under any applicable provision of law to be included in the donor's taxable estate.

17 7. The Nathan Shure Trust is an irrevocable trust created on December 27, 1934, by Nathan Shure. A true and correct copy of the Nathan Shure Trust Agreement, together with Exhibit A appended thereto, is attached hereto as Exhibit I, and is by this reference expressly made a part hereof. At the time the Nathan Shure Trust was created, Nathan Shure transferred certain securities to the said trust which are described in the trust agreement. The income of the Nathan Shure Trust was derived from the said securities transferred to the trust by Nathan Shure, and from investments which were made with accumulated trust income. The securities transferred by Nathan Shure to the Nathan Shure Trust were transferred without consideration.

8. From August 20, 1935, down to the date of his death, Nathan Shure paid income tax on the portion of the Nathan Shure Trust income that was used to pay premiums upon the above described life insurance policies.

9. All of the premiums on the above described insurance policies prior to August 20, 1935, were paid by N. Shure Co. All of the premiums on said policies after August 20, 1935, down to July 11, 1952, the date of Nathan Shure's death, were paid by the trustees of the Nathan Shure Trust out of the income of that trust.
18 A schedule showing the amounts and dates of all premium payments made on the above described insurance policies is attached hereto as Exhibit J, and by this reference expressly made a part hereof.

10. The income of the Nathan Shure Trust, the amount thereof used to pay premiums on the above described insurance policies, and the amounts distributed to the wife and children of Nathan Shure, the beneficiaries thereunder, were as follows, for the years 1935 through 1952, inclusive.

Year	Income before Income tax	Life Insurance Premiums Paid	Distriibutions to Beneficiaries
1935	$ 19,532.26	$	$12,000.00
1936	61,969.10	17,807.50	12,000.00
1937	53,771.88	17,543.00	12,000.00
1938	25,521.96	17,622.75	12,000.00
1939	54,525.89	17,906.75	12,000.00
1940	127,294.51	17,828.00	12,000.00
1941	84,330.34	17,741.75	12,000.00
1942	57,383.68	22,157.50	12,000.00
1943	73,194.51	22,105.50	12,000.00

1944	Additional Amount Distributed to Beneficiaries for Years 1935-1943 Inclusive		16,076.88
1944	79,889.76	22,026.00	16,931.88
1945	69,761.64	21,897.50	12,000.00
1946	72,249.91	21,848.50	12,612.44
1947	59,371.13	21,857.50	12,000.00
1948	104,300.34	21,791.00	29,254.68
1949	92,007.93	22,191.00	23,637.48
1950	94,716.44	22,135.00	24,290.89
1951	97,521.10	21,880.50	25,820.32
1952	113,359.59	21,818.90	45,770.80

11. At the times indicated, the outstanding voting shares of N. Shure Co. were owned as follows:

19

	No. of Voting Shares Outstanding	No. of Voting Shares Owned by Nathan Shure	No. of Voting Shares Owned by Nathan Shure Trust
December 29, 1934 to November 30, 1936	873	873*	0
December 1, 1936 to April 30, 1940	1250	873*	377
May 1, 1940 to July 11, 1952	2250	1133*	1117

* Including 5 shares owned by Samuel Shure and Joseph N. Shure, sons of Nathan Shure, and Yetta Shure, wife of Nathan Shure.

12. Attached as Exhibits K, L, M and N to this stipulation, and by this reference expressly made a part hereof, are true and correct copies of letters dated June 10, June 10, June 15, and October 2, 1959, from the Mutual Life Insurance Company of New York, the Mutual Benefit Life Insurance Company of Newark, New Jersey, the Prudential Insurance Company of America and the Travelers Insurance Company, respectively, all relating to the above mentioned insurance policies and certain endorsements and riders placed thereon. Each of said

letters was written by a duly authorized representative of the company involved, said representative being fully qualified to state and express the practices, usages and views of said company, and the writer thereof, if called to testify as a witness in this proceeding, and permitted to testify over the defendant's objections, would testify to the statements made in said letter of which he was the author. The defendant would object to the admission into evidence of the statements contained in Exhibits K, L, M and N on the ground of relevancy and on the further ground that said statements consist of conclusions of the writers thereof and the companies which they represent as to the legal effect of the transactions referred to therein.

13. The total proceeds (including post-mortem dividends and interest) of the aforesaid policies of insurance, namely, $276,936.38, were, upon the death of Nathan Shure, paid to the Nathan Shure Trust which, pursuant to certain of the endorsements mentioned in Paragraph 6 of this Stipulation of Facts, had been designated as beneficiary of all of said policies.

14. If the court should decide that none or only a portion of the above described life insurance proceeds is includible in the Estate of Nathan Shure, then within thirty days of the date of such decision, the parties will agree upon the amount of the judgment which should then be entered. In such case the parties respectfully request the court to leave the record in this cause open for said 30 days so that if the parties are unable to agree as to the amount of judgment, additional proof with respect thereto can be offered.

Approved:

Gottlieb and Schwartz
By /s/ Bernard Weisberg
Attorneys for Plaintiffs

/s/ R. Tieken
United States Attorney
Attorney for Defendant.

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No. 608

In the Supreme Court of the United States

October Term, 1951

ELLA SEIDEL CARSE TRUST, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PHILIP B. PERLMAN,
Solicitor General,
DAVID L. BAZELON,
Assistant Attorney General,
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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	4
Argument	6
Conclusion	9
Appendix	10

CITATIONS

Cases:	
Burnet v. *Wells*, 289 U.S. 670	7
Carlton, Estate of v. *Commissioner*, decided January 18, 1962, reversing 34 T.C. 988	8
Helvering v. *Reybine*, 83 F. 2d 215	7, 8
McWilliams v. *Commissioner*, 331 U.S. 694	6
Mudge, Estate of v. *Commissioner*, 27 T.C. 188	7
United States v. *Manufacturers Nat. Bank*, 363 U.S. 194	8
Wisconsin Mem. Park Co. v. *Commissioner*, 255 F. 2d 751	6
Constitution and Statutes:	
Constitution of the United States, Fifth Amendment	2
Internal Revenue Code of 1939 (26 U.S.C. 1952 ed):	
Sec. 167 (a)	2, 6
Sec. 811 (g)	2, 3, 6
Internal Revenue Code of 1954 (26 U.S.C.), Sec. 2042	9
Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 404	3, 8
Miscellaneous:	
H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 162–163 (1942–2 Cum. Bull., 372, 491)	6
Treasury Regulations 105, Sec. 81.27	4, 7

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 608

ELLA SHURE CAHEN TRUST, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–12a) is reported at 292 F. 2d 33. The opinion of the district court (R. 20–32)[1] is reported at 193 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1961 (Pet. App. 13a). By order of Mr. Justice Clark the time for filing the petition for a writ of certiorari was extended to and including December 16, 1961 (Pet. App. 14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Record references are to Appendix I below. The Appendix containing the exhibits is referred to separately as "Ex. App."

QUESTIONS PRESENTED

1. Whether the court below correctly held that the decedent's use of a funded trust to pay the premiums on life insurance policies is an indirect payment of premiums requiring the inclusion of the proceeds in his gross estate under Section 811(g)(2)(A) of the Internal Revenue Code of 1939.

2. Whether the application of Section 811(g)(2)(A) to the pro rata share of the proceeds, purchased with premiums paid after the enactment of the section under a trust created prior thereto, is in violation of the Fifth Amendment of the Constitution of the United States.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

* * * * *

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor * * *,

then such part of the income of the trust shall be included in computing the net income of the grantor.

* * * * *

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or

personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(g) [As amended by Section 404(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Proceeds of Life Insurance*—

(1) *Receivable by the executor.*—To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

(2) *Receivable by other beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person * * *.

* * * * *

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 404. PROCEEDS OF LIFE INSURANCE.

* * * * *

(c) *Decedents to Which Amendments Applicable.*—The amendments * * * shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on

or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy.

Treasury Regulations 105:

SEC. 81.27. [As amended by T.D. 5239, 1943 Cum. Bull. 1081, and T.D. 5699, 1949–1 Cum. Bull. 181. Federal Tax Regulations, 1954, U.S.C. Cong. & Adm. News, p. 818.] *Insurance receivable by other beneficiaries.*

(a) * * *

(2) The purchase of insurance upon the life of the decedent is attributed to the decedent even though the premiums, or other consideration, are paid only indirectly by the decedent. As thus used, the phrase "paid indirectly by the decedent" is intended to be broad in scope. For example, if the decedent transfers funds to his wife so that she may purchase insurance on his life, and she purchases such insurance, the payments are considered to have been made by the decedent even though they are not directly traceable to the precise funds transferred by the decedent. A decedent similarly pays the premium or other consideration if payment is made by a corporation which is his alter ego or by a trust whose income is taxable to him, as, for example, a funded insurance trust. A payment is also made by the decedent if the decedent's employer makes the payment as compensation for services.

* * * * *

STATEMENT

On December 27, 1934, the decedent, Nathan Shure, created an irrevocable trust to which he transferred

without consideration 100 shares of Nathan Shure Realty Corporation. The trust derived its income from these securities and from investments of accumulated income, and was divided into four beneficiary shares, each beneficiary to receive $3,000 annually from the net income and the distribution of a share of the principal upon termination of the trust. The trustees agreed to "pay the premium * * * on any policy or policies of life insurance upon the life of the Settlor wherein the Trustees shall be named as beneficiaries" (Pet. App. 1a, 9a–10a; Ex. App. 47–48, 59–60).

On August 20, 1935, when Shure was 67 years of age (Pet. App. 10a), he irrevocably named the trust the beneficiary of six insurance policies on his life that he had previously acquired and which then had a cash surrender value of $32,548.07 (Pet. App. 1a); Shure retained no incidents of ownership. Shure paid the federal gift tax on the transfer, and his estate was given an estate tax credit for the amount paid. From August 20, 1935, to Shure's death on July 11, 1952, the trust paid the premiums on the life insurance policies. Pursuant to Section 167(a)(3) of the 1939 Code, Shure reported, and paid the income tax on, the portion of the income which the trustees used to pay the premiums (Pet. App. 2a).[4] On Shure's death, the proceeds of the policies, in the amount of $276,936, were paid to the trust.

The court of appeals affirmed the decision of the district court that the gross estate included that portion of the proceeds which was attributable to the

premiums paid by the trustees after January 10, 1941, the effective date of Section 811(g)(2)(A). By this decision, the estate tax was increased by $76,517.88.

ARGUMENT

1. The court below correctly concluded upon the basis of the undisputed facts, that the premiums paid by the Shure trust, as directed by the decedent, were "paid indirectly by the decedent and that the proportionate share of the proceeds of these life insurance policies must be included in the gross estate" (Pet. App. 11a). Section 811(g)(2)(A) expressly requires the inclusion in the gross estate of a proportionate share of the proceeds of insurance policies "purchased with premiums, or other consideration, paid directly or indirectly by the decedent." The payment of premiums by a trust established and funded by the decedent, the terms of which direct the trustees so to apply the trust assets, clearly constitute, we submit, an indirect payment of the premiums "by" the decedent.

The use of the terms "paid directly or indirectly" evidences a Congressional desire to have the statute broadly construed. Cf. *McWilliams* v. *Commissioner*, 331 U.S. 694; *Wisconsin Mem. Park Co.* v. *Commissioner*, 255 F. 2d 751 (C.A. 7th). Any doubts are resolved by the House Committee Report accompanying the enactment of the statute, which states (H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 162–163 (1942–2 Cum. Bull. 372, 491) (emphasis added)):

> Payments of premiums or other consideration by the decedent include payments made by him directly or indirectly. This provision is

> intended to prevent avoidance of the estate tax and should be construed in accordance with this objective. For example, if the decedent transfers funds to his wife so that she may purchase insurance on his life, and she purchases such insurance, the payments are considered to have been made by the decedent even though they are not directly traceable to the precise funds transferred by the decedent. *A decedent similarly pays the premium or other consideration if payment is made* by a corporation which is his alter ego or *by a trust whose income is taxable to him, as, for example, a funded insurance trust.* Payment is also made by the decedent if the decedent's employer makes payment as compensation for services. These examples merely illustrate the concrete application of the provision.[2] [Emphasis added.]

The present case involves the very kind of "funded insurance trust" referred to by the committee, the income of which (to the extent used to pay premiums) was admittedly taxable to the decedent under Section 167(a)(3) of the 1939 Code. See *Burnet* v. *Wells*, 289 U.S. 670.

2. Petitioners' claim, that the present decision conflicts with *Helvering* v. *Reybine*, 83 F. 2d 215 (C.A. 2d), is misplaced. The terms of the trust instrument in *Reybine*, unlike those in this case, did not direct the payment of premiums but merely gave the trustees discretion to do so.[3] In addition, as the court below noted

[2] Section 81.27(a) of Treasury Regulations 105 is to the same effect.

[3] This feature also distinguishes *Estate of Mudge* v. *Commissioner*, 27 T.C. 188.

(Pet. App. 11a), *Reybine* was decided prior to the 1942 amendatory statute enacting the "directly or indirectly" test, which, coupled with the legislative history of the amending Act, "destroyed the effect of this decision." Moreover, on January 18, 1962, the Second Circuit, the same court which decided *Reybine*, reversed the Tax Court decision upon which petitioners rely (Pet. 9), and, disavowing the continuing force of *Reybine*, followed the *Cahen* decision. *Estate of Newcomb Carlton* v. *Commissioner*, reversing 34 T.C. 988.*

3. There is no merit to petitioners' claim that a tax on the share of the proceeds attributable to premiums paid *after* the enactment of the statute (see Section 404(c) of the Revenue Act of 1942) is unconstitutionally retroactive. Both the court below (Pet. App. 12a) and the Second Circuit in the *Carlton* case (App., *infra*, p. 16), correctly held, on the authority of *United States* v. *Manufacturers National Bank*, 363 U.S. 194, that the tax is "being levied not on property disposed of prior to the legislation but upon property growing out of payments made thereafter with funds considered by the law equivalent to those of the decedent."

4. Quite apart from the absence of a conflict, the issue here lacks importance for the future. As petitioners acknowledge (Pet. 12), the alternative "premium payment" test of includibility of insurance pro-

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*The petitioners here virtually concede the conclusory effect of the *Carlton* decision by their suggestion that action on their petition be deferred until the *Carlton* case was decided by the Second Circuit, as it now has been (Pet. 7). The *Carlton* opinion is printed in the Appendix to this brief, *infra*.

ceeds in the taxable estate has been eliminated in the Internal Revenue Code of 1954 in favor of the single "incidents of ownership" test. See Section 2042 of the 1954 Code.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1962.

APPENDIX

United States Court of Appeals for the Second Circuit

No. 82—September Term, 1961

(Argued December 6, 1961. Decided January 18, 1962)

Docket No. 26930

ESTATE OF NEWCOMB CARLTON, DECEASED, WINSLOW CARLTON AND THE CHASE MANHATTAN BANK, EXECUTORS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF NEWCOMB CARLTON, DECEASED, WINSLOW CARLTON AND THE CHASE MANHATTAN BANK, EXECUTORS, RESPONDENT

Before MEDINA, SMITH and MARSHALL, *Circuit Judges*

Appeal by taxpayer from decision of Tax Court, 34 T.C. 988 (1960), holding portion of proceeds of life insurance attributable to payments of premiums by decedent prior to January 10, 1941 includible in decedent's gross estate because of retention of incidents of ownership, and appeal by Commissioner from decision that payments of premiums by trustees

did not constitute "indirect payments" by decedent, and that portion of proceeds attributable thereto was not includible in gross estate. Reversed on both appeals.

WALTER E. BEER, Jr.,
New York, N.Y., for Taxpayer.
L. W. POST,
Attorney, Department of Justice, Washington, D.C. (John B. Jones, Jr., Acting Asst. Attorney General, Meyer Rothwacks, Attorney, Dept. of Justice, Washington, D.C., on the brief), for Commissioner of Internal Revenue.

SMITH, *Circuit Judge:*

Newcomb Carlton established a trust which was funded by certain securities and twenty-one life insurance policies, with a total face value of $237,620.00 on the life of the settlor. The trustees were directed to utilize the income from the securities to pay the premiums on the insurance policies and the grantor was to receive, during his life, any income in excess of that required to pay the premiums. In no calendar year from the inception of the trust in 1930, until the death of the decedent in 1953, were the dividends on the policies and the income from the securities sufficient to pay the expenses of the trust and the premiums due. From 1930 to 1936 the grantor made payments aggregating $36,080.78 and thereafter his son, Winslow Carlton, the beneficiary, made payments totaling $17,637.55 up to January 11, 1941 and $32,790.43 thereafter.

The Commissioner held that the entire proceeds of the life insurance, totaling $239,327.54, as well as the securities held in trust valued at $34,442.50 were includible in the gross estate of decedent.

The Tax Court, in a decision reported at 34 T.C. 988 (1960) upheld the Commissioner only as to the portion of the proceeds of the policies attributable to payments made directly by decedent prior to January 10, 1941, totaling $139,018.77, which were held includible in his gross estate because of the retention by decedent of certain powers[1] subsequent to January 10, 1941 which were held by the Tax Court to constitute an "incident of ownership" in the policies within the meaning of Section 811(g)(2)(A) of the Internal Revenue Code of 1939, as amended by Section 404 of the Revenue Act of 1942, c. 619, 56 Stat. 798.[2] The taxpayer appeals this determination and challenges the constitutionality of the statute as applied.

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[1] The indenture granted to the trustees the power:

"To invest the principal of the Trust Fund in such investments, including preferred and common stocks, as they in their discretion may deem for the best interests of the Trust Estate, without being limited to such investments as are authorized by law for Trust Funds, and to retain, without responsibility for depreciation in principal value, any securities that may be deposited with the Trustees by the Grantor; provided, however, that during the life of the Grantor, no sales of securities or reinvestments shall be made except upon his direction or with his consent and approval in writing. Such direction or approval may be in general terms and may be modified from time to time."

[2] "(c) [as amended by Section 503(a) of the Revenue Act of 1950, c. 994, 64 Stat. 906] *Decedents to Which Amendments Applicable.*—The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the portion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy * * *"

The Commissioner appeals from the decision of the Tax Court that payments of premiums by the trustees did not constitute "indirect payments" by the decedent within the meaning of Section 811(a)(2)(A) of the Internal Revenue Code of 1939, as amended by Section 404(a) of the Revenue Act of 1942.

I. *Incidents of ownership*

Section 404(c) of the Internal Revenue Act of 1942 provides that the portion of the proceeds of policies of insurance on the life of decedent, attributable to premiums paid by him prior to January 10, 1941 are includible in his gross estate only if subsequent to that date he was possessed of an "incident of ownership" in the policies. The Tax Court concluded that:

> Decedent as grantor had reserved the right to direct the investment of the securities in the trust and to receive the income in excess of that necessary to pay the premiums. Decedent, having also reserved the right to discharge the trustees without cause and appoint trustees of his own choosing, was assured of having trustees who would follow his direction as to the investment of the trust funds. [Citation omitted.] The investment of the trust fund was not limited to investments approved by law for trust funds and investments could be made in common stocks * * * Decedent * * * could have directed that all the securities * * * be sold and the proceeds placed in currently non-income producing stocks which in his opinion would increase in value or produce a higher income in some future year. This could have required borrowing against the insurance policies to pay the premiums thereon. These powers, reserved in decedent as grantor to handle the trust corpus in a way that might necessitate the use of the loan value of the insurance policies in an effort to increase the future income of the trust

> for the ultimate benefit of the grantor individually as well as for the trust, while differing in degree, are not distinguishable in principle from the rights reserved by the grantor of the trust in *Estate of Myron Selznick* [15 T.C. 716 (1950), affirmed 195 F. 2d 735 (9 Cir. 1952)] * * * to increase his income from the trust by surrendering the insurance policies for cash and adding such cash to the corpus of the irrevocable trust the income of which he had retained for life. Decedent saw fit to reserve unto himself as grantor of the trust until December 7, 1943 powers and control over the trust that could have been exercised in such a manner as to affect the interests of the trust beneficiary in the insurance policies. Instant Case, 34 T.C. 988, 999 (1960).

Laying aside the extremely conjectural and altogether unrealistic course of conduct envisioned in the Tax Court, the decedent did not retain the right to order the sale of the securities. He reserved to himself individually only the power to withhold approval in the case of any proposed sale, investment or reinvestment so that while he might prevent the sale of securities he had no power to force such sale. While it may be true that this veto power reserved by the grantor was not a power in trust and could therefore be used selfishly, under the terms of the trust it was necessary for the trustees to exercise their judgment as to the wisdom of any sale or investment, and concur therein, before any action such as that envisioned by the Tax Court might be taken.[3] In exercising their discretion the trustees were bound to deal fairly and impartially between the beneficiaries of the trust. *In*

[3] The trust instrument conferred discretion on the trustees which was limited by the requirement that the approval of the grantor be obtained but it did not permit, or require, the trustees to abdicate their responsibilities. See note 1, *supra*.

re Hubbell's Will, 302 N.Y. 246, 97 N.E. 2d 888, 47 A.L.R. 2d 176, 178 (1951), and cases cited therein; Restatement, Trusts § 183 (2d ed. 1959). More specifically, absent specific instructions in the trust instrument the trustees could not have invested in non-income producing securities for they had a duty to Winslow Carlton, the ultimate beneficiary, to employ profitably the funds entrusted to them. *In re Hubbell's Will, supra; Matter of Ayranzian's Estate*, 153 Misc. 467, 477, 275 N.Y.S. 123, 136 (Surr. Ct. 1934); *In re Gordon's Will*, 181 Misc. 536, 539, 40 N.Y.S. 2d 888, 891 (Surr. Ct. 1943); Restatement, Trusts § 181 (2d ed. 1959). Nor might the trustees invest in unduly speculative securities, for a trustee is obliged not only to attempt to employ profitably the corpus but must also take care to preserve it. *In re Wind's Estate*, 1 Misc. 2d 260, 145 N.Y.S. 2d 188 (Surr. Ct. 1955); *In re Fay's Estate*, 155 N.Y.S. 2d 789 (Surr. Ct. 1956).

We conclude that the grantor did not have the power to force the trustees to do that which is prohibited by law—to manipulate the trust for the ultimate benefit of the grantor individually to the detriment of Winslow Carlton, the ultimate beneficiary of the insurance policies—(there is no claim that he ever attempted to exercise such a power), and therefore did not retain "an incident of ownership" subsequent to January 10, 1941.

II. *Indirect payments*

That portion of the proceeds of the policies which are attributable to premiums paid "directly or indirectly" by the decedent after January 10, 1941 are includible in his gross estate under Section 811(g)(2)(A), Internal Revenue Code, 1939. The Tax Court concluded that the payment of premiums by the trus-

tees, from the trust income, did not constitute "indirect" payments by decedent, relying upon *Estate of Mudge*, 27 T.C. 188 (1956), acq., 1957-Cum. Bull. 4, which had followed this court's decision in *Helvering* v. *Reybine*, 83 F. 2d 215 (2 Cir. 1936).

Reybine was decided several years prior[4] to the adoption of the 1942 Amendments to Section 811(g) and construed the statute as it then existed,[4] i.e., absent a specific reference to payments which were made "indirectly" by the decedent.

If the plain wording of the statute should leave any doubt as to its applicability to the instant case, this is dispelled by the relevant committee reports.

> A decedent similarly pays the premium or other consideration if payment is made by * * * a trust whose income is taxable to him, as, for example a funded insurance trust. S. Rep. 1631, p. 235, 77th Cong. 2d Sess.

The income of a trust established by the grantor to maintain and preserve insurance policies on his own life, for the benefit of the natural objects of his bounty is clearly taxable to the grantor. *Burnet* v. *Wells*, 289 U.S. 670 (1932).

Not only was *Reybine* decided prior to the enactment of the 1942 Amendment, as pointed out by the Seventh Circuit which decided the same issue now before this court in favor of the Commissioner, *Cahen Trust* v. *United States*, 292 F. 2d 33, 39 (7 Cir. 1961), but it is not in line with the modern course of decision

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[4] Section 302(g) of the Revenue Act of 1926:

"(g) *Proceeds of Life Insurance.*—To the extent of the amount receivable by the executors as insurance under policies taken out by decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

which tends to place greater emphasis upon economic realities in the Income Tax as well as the Estate and Gift Tax areas, which should, incidently, where possible, be interpreted in a logically consistent manner. For a general discussion see Paul, Federal Estate and Gift Taxation, § 10.36 (1946 Supp.); Lowndes & Kramer, Federal Estate and Gift Taxes, c. 12, § 11 (1956)..

The taxpayer argues that the Commissioner is bound by acquiescence in *Estate of Mudge, supra*, and by having failed to raise the point below. No estoppel may be asserted against the Commissioner by virtue of his acquiescence in a former case not involving the same taxpayer, particularly where no action has been taken by the party before the court in reliance upon the acquiescence which is said to give rise to the estoppel, which would bar the Commissioner from asserting a theory of taxability in a particular case. *Cahen Trust* v. *United States, supra*, at 39; *Securities and Exchange Commission* v. *Culpepper*, 270 F. 2d 241, 248 (2 Cir. 1941).

The failure of the Commissioner to urge the point below is undoubtedly due to our decision in *Reybine* which was applied by the Tax Court in *Mudge* to the 1942 Amendment. Subsequent to the decision of the Tax Court in the case at bar the *Reybine* case was distinguished by the Seventh Circuit, *Cahen Trust* v. *Commissioner, supra*, which refused to follow *Mudge, Id.* at 39. Concluding, as we do, that the *Cahen* decision is sound, the decedent's estate may not escape its obligation to pay the tax. Where there are unusual circumstances, such as an intervening decision in point, an appellate court will consider a legal argument not made in the lower court. *Hormel* v. *Helvering*, 312 U.S. 552 (1941). Cf. *Uebersee Finanz-korporation, A.G.* v. *McGrath*, 343 U.S. 205

(1952). Moreover, in the instant case the Tax Court did in fact rule upon the issue when it made a finding of law with respect to those premiums paid by the trustees, for the opinion states as follows:

> The payments of premiums by the trustees from the trust income * * * are not indirect payments by decedent. *Estate of Edmund W. Mudge*, 27 T.C. 188 (1956).

The constitutionality of Section 811(g)(2)(A) as applied to premiums paid directly by the decedent has been upheld by the Supreme Court on the ground that the taxable event is the death of the insured at which time the rights of the beneficiary are "genuinely enlarged." *United States* v. *Manufacturers National Bank*, 363 U.S. 194 (1960). That case is indistinguishable in principle from the case before this court. Only that portion of the proceeds attributable to payments made after the passage of the statute is being subjected to taxation. The taxpayer argues that having established the trust the decedent was committed and could in no way escape the imposition of the Estate Tax on that portion of the proceeds attributable to premiums paid by the trustees. But the possibility that the tax laws may be altered always exists, and to say that an individual can render himself immune to future tax laws by the simple expedient of irrevocably committing himself to a course of action designed to minimize taxes under existing laws, is patently absurd. The tax is being levied not on property disposed of prior to the legislation but upon property growing out of payments made thereafter with funds considered by the law equivalent to those of the decedent.

The decision of the Tax Court is reversed on both appeals and the case is remanded for proceedings in accordance with this opinion.

MEDINA, *Circuit Judge* (concurring):

The majority opinion quotes from the decision of the Tax Court the hypothetical scheme that the Tax Court held the grantor might have put into effect, and from which it concluded that the grantor's reserved rights under the terms of the trust instrument constituted an "incident of ownership." I agree that this basis for the decision of the Tax Court is unrealistic and unlawful, but, in concurring in the reversal of the decision of the Tax Court, I would particularly emphasize the terms of the trust instrument itself.

It is clear from the trust instrument that the trustees could not make non-income producing investments either for the purpose of setting up a situation that would make it necessary to borrow against the insurance policies to pay the premiums thereon, or, even without such purpose, if the effect of such investment in non-income producing securities might or probably would make such borrowing necessary. In the very first paragraph of the trust instrument the grantor directed that: "The Trustees upon the maturity of the said policies, will use their best efforts to collect the proceeds thereof * * * and will hold, invest, and reinvest such net proceeds and collect the income therefrom and will pay over the same as hereinafter provided." In the second paragraph the grantor transferred to the trustees securities and directed that they collect the income therefrom and, "During the lifetime of the Grantor, * * * apply the net income to the payment of the premiums upon the policies of life insurance deposited hereunder, and to pay quarterly to the Grantor, any balance of the net income not required for the purpose

of paying such premiums." And elsewhere in the trust instrument the grantor provided that:

> In case at any time the net income in the hands of the Trustees shall not be sufficient to pay the premiums then due on the policies of insurance deposited hereunder, the Trustees may invade the principal of the Trust Fund and use so much thereof as may be necessary to make up the deficiency, or may obtain loans on any of the policies deposited hereunder and use so much of the proceeds of such loans as may be necessary to make up the deficiency. The Grantor may, in case the net income in the hands of the Trustees shall at any time not be sufficient to pay the premiums then due on the policies of insurance deposited hereunder, pay to the Trustees, on account of income, any amount sufficient to make up such deficiency, and the Trustee shall accept and use such payment for such purpose.

In the paragraph wherein the grantor stated his intention to part with, and transfer to the trustees, all rights to the insurance policies, the right to surrender them for their cash surrender values and the right to obtain loans on them are listed; however, these rights could of course be exercised only as directed by the grantor elsewhere in the trust instrument and in conformity with the purpose and intent of the trust. In other words, subject to the primary and clearly implied direction that the policies be preserved for and the proceeds paid to the grantor's son, the beneficiary. The same qualification applies to the power of the trustees to "invest the principal of the Trust Fund in such investments * * * as they in their discretion may deem for the best interests of the Trust Estate."

Thus, from the trust instrument itself it is evident that the trustees were not empowered to borrow

against the insurance policies to make investments; nor could they have embarked upon an investment program which would have required them to do so. The intent of the grantor, and the purpose of the trust, was to preserve the policies for the benefit of the grantor's son, and to do so by investing the trust principal so as to receive an income with which to pay the premiums on the policies.

On the cross-appeal I also concur in the reversal of the Tax Court.

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